

CIVIL SERVICE COMMISSION MINUTES
February 6, 2008

A regular meeting of the Civil Service Commission was held at 2:30 p.m., in Room 358 of the County Administration Center, 1600 Pacific Highway, San Diego, California.

Present were:

Francesca Krauel
W. Dale Bailey
A.Y. Casillas
Barry I. Newman
Cheryl Fisher

Absent was:

None

Comprising a quorum of the Commission

Support Staff Present:

Patt Zmary, Executive Officer
William D. Smith, Senior Deputy County Counsel

Selinda Hurtado-Miller, Reporting

Approved
Civil Service Commission
March 5, 2008

COUNTY OF SAN DIEGO
CIVIL SERVICE COMMISSION MINUTES
FEBRUARY 6, 2008

2:00 P.M. CLOSED SESSION: Discussion of Personnel Matters
and Pending Litigation

2:30 p.m. OPEN SESSION: Room 358, 1600 Pacific Highway, San
Diego, California

<u>Discussion Items</u>	<u>Continued</u>	<u>Referred</u>	<u>Withdrawn</u>
3,5,6,8,9,10,11,12 13,14,21	10,11,12,13,13	6,7	18,19,20

COMMENTS: Motion by Newman to approve all items not held for
discussion; seconded by Casillas. Carried.

CLOSED SESSION AGENDA
County Administration Center, Room 400B
(Notice pursuant to Government Code Sec. 54954.2)
Members of the public may be present at this
location to hear the announcement of the
closed session agenda.

A. Commissioner Krauel: **Aida Delgado**, former Office
Assistant, requesting employment reinstatement with the
Health and Human Services Agency.

OPEN SESSION AGENDA
County Administration Center, Room 358

NOTE: Five total minutes will be allocated for input on Agenda
items unless additional time is requested at the outset and
approved by the Commission President. **Please be sure to silence
your cell phones and pagers.**

MINUTES

1. Approval of the Minutes of the regular meeting of January
16, 2008.

Approved.

CONFIRMATION OF ASSIGNMENT

2. Commissioner Fisher: Donovan Jacobs, Esq. on behalf of **2008-01**, appealing an Order from the Sheriff's Department.

Confirmed.

3. Commissioner Krauel: Julie Buechler, Esq., on behalf of **2008-02**, appealing an Order from the Sheriff's Department.

Sanford Toyen, Sheriff's Legal Advisor, addressed the Commission regarding this item as well as item 5 below. Mr. Toyen requested that both items be consolidated into one hearing as they arise out of the same set of operative facts. He further gave two reasons why consolidation would be in the County's best interests: 1) economy of resources; and 2) it would prevent inconsistencies in decisions by the Commission. Mr. Toyen cited the Copley case in his argument saying the court did not mandate that companion cases of peace officers be severed.

William D. Smith, Sr. Deputy County Counsel, advised the Commission to conduct two separate hearings, but to appoint the same hearing officer for both cases.

Motion by Newman to reassign Agenda Items 3 and 5 to one hearing officer (without consolidating the items); seconded by Casillas. Carried. Commissioner Krauel assigned.

4. Commissioner Casillas: Richard Pinckard, Esq. on behalf of **2008-03**, appealing an Order from the Sheriff's Department.

Confirmed.

5. Commissioner Bailey: Fern Steiner, Esq. on behalf of **2008-04**, appealing an Order from the Sheriff's Department.

See Item No. 3 above.

Motion by Newman to reassign Agenda Items 3 and 5 to one hearing officer (without consolidating the items); seconded by Casillas. Carried. Commissioner Krauel assigned.

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DISCRIMINATION

Complaints

6. **Lynn Falvey**, Protective Services Supervisor, alleging disability discrimination by the Health and Human Services Agency. (See Item No. 16 below.)

RECOMMENDATION: Assign an Investigating Officer and concurrently appoint the Office of Internal Affairs to conduct an investigation and report back.

Staff recommendation approved. Commissioner Fisher assigned.

7. **Liesbeth van den Bosch**, Deputy Alternate Public Defender IV, alleging gender discrimination by the Office of the Alternate Public Defender. (See Item No. 13 below.)

RECOMMENDATION: Assign an Investigating Officer and concurrently appoint the Office of Internal Affairs to conduct an investigation and report back.

Staff recommendation approved. Commissioner Newman assigned. Commissioner Krauel not participating.

Findings

8. Commissioner Bailey: **John Rench**, former Protective Services Worker, alleging disability and gender discrimination by the Health and Human Services Agency.

FINDINGS AND RECOMMENDATIONS:

At the regular meeting of the Civil Service Commission (Commission) on October 3, 2007, the Commission appointed W. Dale Bailey to investigate the complaint submitted by John Rench, which alleged disability and gender discrimination by the Health and Human Services Agency. In accordance with the established rules and procedures of the Commission, the matter was concurrently referred to the Office of Internal Affairs (OIA) for investigation. The OIA concluded the investigation and has reported its findings to the Commission.

The Investigating Officer has taken into consideration all documentation submitted in this matter. The report of OIA has been received and reviewed by the undersigned Investigating Officer who concurs with OIA's Report and has concluded that the evidence does not support a finding of probable cause that a violation of discrimination laws

occurred. It is therefore recommended that Mr. Rench's Rule VI discrimination complaint be denied; and that the Commission approve and file this report with the appended OIA Summary Investigative Report with a finding of no probable cause to believe that the Complainant has been unlawfully discriminated against.

Motion by Bailey to approve Findings and Recommendations; seconded by Newman. Carried.

REINSTATEMENT REQUEST

Findings

9. Commissioner Krauel: **Aida Delgado**, former Office Assistant, requesting employment reinstatement with the Health and Human Services Agency.

FINDINGS AND RECOMMENDATIONS:

The matter of the request of Aida Delgado ("Employee" hereinafter) for reinstatement, after a written notice informing Employee that, pursuant to the presumption contained in Section 14.2.3 of the Civil Service Rules, the Health and Human Services Agency ("Department" hereinafter) had deemed Employee to have resigned from her class and position of Office Assistant in the Department, was presented to the Civil Service Commission. Thereafter, the matter was duly noticed and came on for hearing December 12, 2007, and January 14, 2008.

Employee was an Office Assistant in the Child Welfare Services Division of the County's Health and Human Services Agency. She was assigned to the Lemon Grove Family Resource Center. Employee was placed on medical leave which authorized her absence from June 11, 2007, through Friday, August 24, 2007. Employee did not report for work on August 27, 28, or 29, 2007 ("days at issue" hereinafter.) Based on the Employee's absence on the days at issue, the Department elected to rely on Civil Service Rule 14.2.3, Resignation Upon Failure to Return After Leave, and terminated her employment on August 24, 2007.

Section 14.2.3 provides that an employee may be presumed to have resigned if the employee fails to return to work within three days after the expiration of an approved leave of absence. Under Civil Service Rule 14.2.3, the sole issue in regard to whether Employee should be reinstated is whether her failure to report for duty within three calendar days from or after August 27 was "excusable." Employee's request

for reinstatement is not an "appeal." The Commission is not reviewing the imposition of discipline by the Department or reviewing an adjudicative decision by the Department. The Department did not conduct a hearing about, or render a decision on, whether the Employee's absence was excusable. The Department made an administrative decision, relying exclusively on the authority granted by Civil Service Rule 14.2.3 that if an employee fails to report for duty within three calendar days after the expiration of a leave of absence, the employee is deemed to have resigned and the Department may administratively separate the employee from employment. The Commission is to examine the circumstances surrounding Employee's absence from work on August 27, August 28, and August 29, 2007, and determine whether Employee was justified in not coming to work. Employee's failure to report to duty after her authorized leave is excusable. Employee testified that on August 27, August 28, and August 29, 2007, she was too sick to work. Employee submitted testimony and written statements from her care-giving mother and a neighbor which corroborated her incapacity.

A Physician's Supplementary Certificate for the California Employment Development Department contained a doctor's certification that, as of August 6, 2007, Employee was being treated for "major depression" and would not be able to return to work until September 30, 2007. Another EDD certificate completed by the same doctor stated that he "attended the patient" from June 12, 2007 through September 28, 2007 "[a]t intervals of: weekly." Her treatment consisted of "medication services, weekly group psychotherapy, [and] individual therapy." This document contained the doctor's revised estimate that Employee would not be able to return to work until December 3, 2007.

Based on the essentially uncontradicted evidence, the Employee was excusably absent from work on August 27, August 28, and August 29, 2007, and entitled to be reinstated. Based on information in the record, on Employee's last day of authorized leave, (August 24, 2007), it appears she was on leave without pay. Employee is entitled to back pay commencing January 14, 2008, when she first provided the Department with sufficient documentation to excuse her absence, and to show she was ready to return to work, and provided medical verification of her ability to return to duty. Employee is not entitled to back pay from August 27, 2007 to January 13, 2008 as she is being returned to her status of authorized leave without pay as of August 24, 2007. The Department offered no evidence or argument on the issues of back pay or other benefits Employee is entitled to

if she is reinstated. Based on the findings and conclusions set forth above, I hereby recommend the following decision:

That Employee be reinstated, effective August 27, 2007; that the reinstatement be without a break in continuous service. Employee is deemed to be on leave without pay from August 27, 2007 to January 14, 2008, when she provided adequate documentation of her medical condition; Employee is entitled to back pay, benefits and interest, minus any wages she received from outside employment, from January 14, 2008, (the day she provided adequate documentation of her illness and ability to return to work) to the date of this Commission's decision. Employee is subject to return to duty immediately following this Commission decision; and that the proposed decision shall become effective upon the date of approval by the Civil Service Commission.

Motion by Krauel to approve Findings and Recommendations; seconded by Casillas. Carried.

SELECTION PROCESS

Appeals

10. **Barton Sheela**, Deputy Alternate Public Defender IV, appealing his non-selection for the classification of Deputy Alternate Public Defender V by the Office of the Alternate Public Defender. (Continued from the January 16th meeting.)

RECOMMENDATION: Deny Request.

Julia Haus, Esq. spoke to the Commission requesting a continuance on Agenda Items 10, 11, 12, 13 and 14. Ms. Haus explained that she was the newly appointed counsel for the Deputy Alternate Public Defenders (DAPDs), and as such, she has not had an opportunity to review the files. She did confirm that she will be representing the DAPDs in the Rule X selection process appeals.

William Songer, Sr. Deputy County Counsel, on behalf of the Department, stated that this request for continuance is similar to the last request, in that employees requested a continuance because they were seeking counsel. Mr. Songer asked again for assurance that this would be the last continuance granted.

Due to the length of time this matter has been on the Commission's Agenda, Commissioner Newman suggested that a provisional hearing officer be appointed, and a hearing date be set. William D. Smith, Sr. Deputy County Counsel, stated

that that suggestion could be incorporated, only if it was a provisional assignment and that the Commission is not confirming that it is granting a hearing at this point.

Motion by Newman to accept request for continuance and assign a provisional hearing officer. Seconded by Casillas. Carried.

Agenda Item Nos. 10, 11, 12, 13, and 14 continued to the next Commission meeting; Commissioner Newman assigned.

Commissioner Krauel not participating.

11. **Mary Ann Knockeart**, Deputy Alternate Public Defender IV, appealing her non-selection for the classification of Deputy Alternate Public Defender V by the Office of the Alternate Public Defender. (Continued from the January 16th meeting.)

RECOMMENDATION: Deny Request.

See Item No. 10 above.

Motion by Newman to accept request for continuance and assign a provisional hearing officer. Seconded by Casillas. Carried.

Agenda Item Nos. 10, 11, 12, 13 and 14 continued to the next Commission meeting; Commissioner Newman assigned.

Commissioner Krauel not participating.

12. **Steven Wadler**, Deputy Alternate Public Defender IV, appealing his non-selection for the classification of Deputy Alternate Public Defender V by the Office of the Alternate Public Defender. (Continued from the January 16th meeting.)

RECOMMENDATION: Deny Request.

See Item No. 10 above.

Motion by Newman to accept request for continuance and assign a provisional hearing officer. Seconded by Casillas. Carried.

Agenda Item Nos. 10, 11, 12, 13 and 14 continued to the next Commission meeting; Commissioner Newman assigned.

Commissioner Krauel not participating.

13. **Liesbeth van den Bosch**, Deputy Alternate Public Defender IV, appealing her non-selection for the classification of Deputy Alternate Public Defender V by the Office of the Alternate Public Defender. (Continued from the January 16th meeting. See Item No. 7 above.)

RECOMMENDATION: Deny Request.

See Item No. 10 above.

Motion by Newman to accept request for continuance and assign a provisional hearing officer. Seconded by Casillas. Carried.

Agenda Item Nos. 10, 11, 12, 13 and 14 continued to the next Commission meeting; Commissioner Newman assigned.

Commissioner Krauel not participating.

14. **Dale Santee**, Deputy Alternate Public Defender IV, appealing his non-selection for the classification of Deputy Alternate Public Defender V by the Office of the Alternate Public Defender. (Continued from the January 16th meeting.)

RECOMMENDATION: Deny Request.

See Item No. 10 above.

Motion by Newman to accept request for continuance and assign a provisional hearing officer. Seconded by Casillas. Carried.

Agenda Item Nos. 10, 11, 12, 13 and 14 continued to the next Commission meeting; Commissioner Newman assigned.

Commissioner Krauel not participating.

Follow-Up

15. Staff report on applicant **Ronald Moore's** review of the test key for Road Maintenance Worker.

This matter was incorporated into the Consent Agenda; Executive Officer, Patt Zamary, assured the Commission that DHR had followed up on the Commission's request to allow Mr. Moore to review the test key.

OTHER MATTERS

Performance Appraisal

16. **Lynn Falvey**, Protective Services Supervisor, Health and Human Services Agency, requesting the sealing of a Performance Appraisal covering the period July 15, 2006 to July 14, 2007. (See Item No. 6 above.)

RECOMMENDATION: Hold in abeyance pending the outcome of a discrimination investigation.

Staff recommendation approved.

Extension of Temporary Appointments

17. Department of Planning and Land Use

1 Cashier (Lorena Rodriguez)

RECOMMENDATION: Ratify.

Item No. 17 ratified.

INFORMATION

18. **George Peterson**, Deputy Alternate Public Defender IV, Office of the Alternate Public Defender, withdrawal of request for a classification review under Civil Service Rule XII. (Commissioner Casillas)

Withdrawn.

19. **Carlos Carrera**, Public Defender Investigator II, withdrawal of complaint alleging age, national origin, race and non-job-related factor (retaliation) by the Office of the Public Defender. (Commissioner Casillas)

Withdrawn.

20. **Carlos Carrera**, Public Defender Investigator II, withdrawal of appeal of his non-selection for the classification of Public Defender Investigator III by the Office of the Public Defender.

Withdrawn.

21. Public Input.

Commissioner Francesca Krauel stated: "Last week the Commission received an employee's written request for a reconsideration of a matter alleging discrimination which

had been decided at the Commission in January. A letter went out to the employee on behalf of the Commission advising that the Commission's process in these types of complaints did not include a provision for reconsideration of the Commission decision. I am not aware of any Civil Service Rule which provides for reconsideration of any matter, yet we did reconsider a matter at our last meeting. The Commissioners received a memo from our staff advising us of the action which had been taken without input of the Commission and enclosing the written employee request.

When I spoke to our staff, I was informed that legal counsel had been consulted in making the decision. I advised our staff that I believe the advice to the employee was incorrect, and that we had reconsidered an item at the very last meeting. I was informed that the difference in this case was that in this case, the Commission had made findings. I have asked for the legal support for this conclusion, and as of yet have received nothing. Our counsel did provide his written opinion which is marked "Confidential". As the attorney-client privilege attaches in this matter, I cannot reveal what was in that opinion.

Even if there is no code provision that specifically authorizes the Commission to reconsider a final decision, the Commission's implied authority supports a reconsideration of a final decision that the Commission may come to believe had been made in error. The conclusion that the Commission is not able to correct a problem could have the Commission looking on ineffectually as a correctable decision is reviewed by a court and set aside. When an employee asks that a matter be reconsidered, I believe there is no reason not to calendar the request, particularly where there is no prejudice to either party. Putting the matter on the agenda is not a promise to reconsider; just to hear the request. The Commission can hear the request and then decide whether there is sufficient reason to reconsider the underlying matter. In fact, in this particular matter, I would have moved that the Commission hear the employee's request for reconsideration by putting in on a future agenda, but I was not on the prevailing side. I did not participate in the original matter. By this statement here today I am not participating in that matter, but rather on the Commission's procedures.

However, any other Commissioner on the prevailing side could make this motion. While finality of decision is a valuable concept, interpreting this concept to mean that a fixable problem cannot be addressed, is not in keeping with the Commission's mandate to be fair and do the right thing."

Commissioner Newman requested that the matter of the Commission's authority regarding reconsideration be placed on the Commission's next agenda.

ADJOURNED: **3:10 P.M.**

NEXT REGULAR MEETING OF THE CIVIL SERVICE COMMISSION:

MARCH 5, 2008